No. 20811

In the United States Court of Appeals for the Ninth Circuit

JACK GOODMAN, PARAMOUNT ICE CREAM CORP. AND FRIGID PROCESS CO., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

PETITION FOR REHEARING

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Appellees, pursuant to Rule 23, respectfully petition for a rehearing of the decision in this case announced on November 18, 1966.

1. *The Court erred in holding that the order of the district court was appealable.* The test by which courts determine whether a proceeding is independent, and therefore appealable, is essentially practical and pragmatic. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 306 (1962); *DiBella* v. *United States,* 369 U.S. 121, 124, 129 (1962); *Carroll* v. *United States,* 354 U.S. 394, 404, note 17 (1957); *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949); *Cobbledick* v. *United States,* 309 U.S. 323, 324–325 (1940); *Cogen* v. *United States,* 278 U.S. 221, 225 (1929). In this case all original documents have been returned to appellant. He has no need for the

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copies. His only purpose of seeking the "return" of the copies, which were made by the Internal Revenue Service and which he never possessed, is to insure the *suppression* of what is alleged to be illegally seized evidence. Where, as here, the only practical purpose to be served by the relief requested is *suppression* of the Government's evidence in some future criminal trial, the case lacks that severability from the criminal case which is essential for an independent, appealable order. *DiBella* v. *United States, supra,* 369 U.S. at 125–127; *Hill* v. *United States,* 346 F. 2d 175 (C.A. 9th), certiorari denied, 303 U.S. 956; *Austin* v. *United States,* 297 F. 2d 356 (C.A. 4th), vacated and dismissed, 353 F. 2d 512; *Badger Meter Mfg. Co.* v. *United States,* 216 F. Supp. 429 (E.D. Wisc.), appeal dismissed, 63–1 USTC § 9332 (C.A. 7th), certiorari denied, 373 U.S. 902; *Greene* v. *United States,* 296 F. 2d 841 (C.A. 2d), vacated with instructions to dismiss appeal, 369 U.S. 403; *Grant* v. *United States,* 291 F. 2d 227 (C.A. 2d), vacated with instructions to dismiss appeal, 369 U.S. 401. As this Court pointed out in *Hill,* "appellant will have ample opportunity to move for this suppression at any criminal proceeding that may be brought against him." 346 F. 2d at 177. The fact that no criminal proceeding has as yet been instituted does not render such an order appealable. There were no criminal proceedings in *Hill, Austin,* or *Badger Meter.*

2. *The Court erred in holding that, where documents have been illegally seized, copies made by the*

Government must be returned along with the originals. We respectfully submit that the authorities cited for this proposition do not support it. There was no order for return of copies in *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392. Judge Learned Hand did make such an order in *United States* v. *Krause,* 270 Fed. 578 (S.D.N.Y.), but we are unable to see that the authorities he cited support him. This Court's statement in *Boren* v. *Tucker,* 239 F. 2d 767, was plainly a dictum. *In re Sana Laboratories, Inc.,* 115 F. 2d 717 (C.A. 3d), and *United States* v. *Pack,* 146 F. Supp. 367 (D. Del.), seem to us rather to support the Government's right to retain copies under the circumstances of this case.

There are a number of reasons why the Government has a right to retain copies, even though the evidence is suppressed in any criminal proceeding against the owner of the illegally seized originals:

a. The Government has a right to use the evidence against a third party whose rights have not been violated by the illegal seizure. *Wong Sun* v. *United States,* 372 U.S. 474, 492; *United States* v. *Granello and Levine,* 243 F. Supp. 325, 326–328 (S.D.N.Y.), affirmed, 365 F. 2d 990, 995–996 (C.A. 2d), petition for certiorari pending.

b. The Government has a right to use the evidence against the owner, if he deliberately opens the door to such use at the trial. *Walder* v. *United States,* 347 U.S. 62, 65.

c. The right of the Government to use the evidence in a purely civil or administrative proceeding involving the owner is still an open question. *Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693, 700–702; *Cleary* v. *Bolger,* 371 U.S. 392, 403, 413 (concurring and dissenting opinions); *Zamaroni* v. *Philpott,* 346 F. 2d 365 (C.A. 7th), certiorari denied, 382 U.S. 903.

d. The copies, having been made by Internal Revenue officials, are the property of the United States and cannot be released without executive authority. *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462; 5 U.S.C. 22; Treasury Regulations 12, Article 80.

In view of the foregoing, it is respectfully submitted that a rehearing should be granted.

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CERTIFICATE OF COUNSEL

The undersigned counsel for the United States hereby certifies that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay. It is further certified that service

of this petition has been made on opposing counsel by sending four copies thereof on this _____ day of December, 1966, in an envelope, with postage prepaid, properly addressed to them as follows:

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